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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

J.D.,

Petitioner,

v.

THE SUPERIOR COURT OF SANTA
CLARA COUNTY,

Respondent,

SANTA CLARA COUNTY
DEPARTMENT OF FAMILY AND
CHILDREN'S SERVICES,

Real Party in Interest.

H039275

(Santa Clara County
Super. Ct. No. JD20633)

J.D., the father of the child at issue in this juvenile dependency case, has filed a petition for writ of mandate seeking review of the juvenile court's orders terminating his services and setting a Welfare and Institutions Code section 366.26¹ permanency planning hearing. The father asserts that the Department of Family and Children's Services (the Department) failed to show that the previous disposition had been ineffective or that returning the child to him would create a substantial risk of harm to the

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

child. As explained below, we disagree with the father's assertions and, therefore, we will deny the writ petition.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Detention

On March 10, 2011, the Yuba County Health and Human Services Department (the Yuba County Department) filed a petition under section 300, subdivision (b) [failure to protect] alleging that the four-year old child came within the jurisdiction of the juvenile court.² The petition alleged that on March 4, 2011, when executing a search warrant, law enforcement officers found drugs, weapons, firearms, and drug paraphernalia in the home shared by the child, the child's eight-year-old half-brother,³ the mother, and the father. The petition further alleged that the father was "aware that the firearms and drugs were in the home and accessible to the children" and that the mother had admitted both she and the father used methamphetamine on a daily basis.

The detention hearing was held on March 11, 2011. The detention report stated that during the execution of the search warrant, the mother had removed drugs, drug paraphernalia, and guns from the master bedroom through a hidden crawl space. The father had admitted that the children regularly slept in the master bedroom, where the contraband was usually stored. There were no security measures in place to prevent the children from accessing the contraband.

The mother and the father had been together for seven years. The mother admitted using methamphetamine with the father "every day for approximately the last six weeks."

² The section 300 petition and other documents relevant to the factual and procedural background are not included in the record filed in the father's case. Therefore, on the court's own motion we take judicial notice of the record filed in the mother's related appeal, *In re J.D.* (No. H039117). (Evid. Code, § 452, subd. (d)(1).) The mother's appeal was dismissed on March 8, 2013.

³ The child's half-brother is not a subject of the instant writ petition, as the petitioner is not this child's father.

The father denied “any and all drug use” but admitted he had received the contraband in “trade” for his tattoo services.

At the conclusion of the detention hearing, the juvenile court found a prima facie showing had been made that the child came within section 300. It further found there would be a substantial danger to the child if returned home and removal was necessary to protect the child. (See § 361, subd. (c)(1).) The juvenile court temporarily vested placement and care of the child with the Yuba County Department and found that reasonable efforts had been made to prevent the removal of the child from the family home.

B. Jurisdiction

The Yuba County Department filed a jurisdiction report on April 21, 2011. The Yuba County Department reported that on or about March 22, 2011, the father had been convicted of fraud and drug charges in Placer County for which he had been placed on formal probation for three years.

On April 27, 2011, the Yuba County Department filed an addendum to the jurisdiction report, recommending the case be transferred to Santa Clara County. The report noted that the mother and the father had moved to San Jose on or about March 31, 2011, and that they intended to remain there.

On May 4, 2011, the juvenile court found by a preponderance of evidence that the allegations contained in the March 10, 2011 petition were true. Accordingly, the juvenile court determined that the child came within the jurisdiction of the juvenile court under section 300, subdivision (b). The juvenile court also ordered: (1) that the child remain detained; (2) that visitation between the parents and the child be supervised by the Yuba County Department; and (3) that the case be transferred to Santa Clara County.

The juvenile court ordered the transfer to Santa Clara County to take place within seven court days. However, the transfer was delayed because the child required emergency dental care. The child had “16 teeth needing to be worked on, 4 or 5 which

need to be extracted,” and had been “presenting with severe dental pain.” Santa Clara County officially accepted transfer of the case on May 31, 2011.

C. Disposition

The Department filed a disposition report on June 21, 2011, recommending that the father receive family reunification services with the child. However, as a result of the evidence seized upon execution of the search warrant, the father had pending criminal charges in Yuba County. The charges included child cruelty, receiving stolen property, participating in a criminal street gang, possession of a controlled substance for sale, and possession of drug paraphernalia. Due to his pending criminal charges, the father was “at risk of being deported back to the Philippines.”

According to the disposition report, the father was 26 years old. In addition to the child at issue here, he had a ten-year-old daughter, who he had been visiting on the weekends, although he “did not see her for a long period of time due to his drug use.” When asked about his substance abuse problem, the father “stated that he does not think that he needs a substance abuse program to stay clean and sober [and] that all he needs to do is go fishing. He stated that when he fishes his mind relaxes and he stays out of trouble.”

The juvenile court entered dispositional orders on June 21, 2011, removing the child from the parents, placing him in the care, custody, and control of the Department, and ordering reunification services, including supervised visitation, for the mother and the father. Additionally, the juvenile court ordered the parents to participate in and complete the Parent Orientation class, a substance abuse parenting class, a 12-step program or other approved substance abuse self-help program, and a substance abuse assessment. The parents were also ordered to submit to random alcohol and drug testing.

D. Interim Reviews

The Department prepared its first interim review report on August 12, 2011. The report stated that the father had been accepted to Dependency Drug Treatment Court on

June 29, 2011, but he had not appeared for his scheduled hearings and had been suspended from the program. The father had failed to begin any of the services ordered in his case plan and he had not visited the child. The child had been placed with his paternal uncle and aunt. On August 8, 2011, the father had been taken into custody in Placer County.

The six-month review was held on December 14, 2011. In the status review report prepared for the six-month review, the Department noted that the father had been released from jail in Placer County in October of 2011, although the father's criminal case in Yuba County was still pending. Upon his release from jail in Placer County, the father had relapsed. On November 9, 2011, the father had been admitted into a detoxification program and was subsequently transferred to residential treatment. As of December 2, 2011, the father remained in residential treatment. Because he was in residential treatment, the father did not complete his Parent Orientation class. Also, the father had not enrolled in the Celebrating Families Parenting Program nor submitted to any random drug testing. The child had been adjusting well in his new home with his paternal uncle and aunt. The father had visited the child, but these visits "ha[d] been very sporadic." Since the father had just recently begun his case plan, the Department recommended that family reunification services be continued. The juvenile court adopted the Department's recommendations.

On April 26, 2012, the Department prepared a report for the 12-month review. The Department recommended continuation of reunification services. The child had recently turned five and continued to reside with his paternal uncle and aunt. As a result of his criminal charges in Yuba County, the father had been placed on probation. The father had left his residential substance abuse treatment program and entered a Transitional Housing Unit (THU). On April 5, 2012, he had graduated from an outpatient treatment program. Additionally, the father had begun attending Dependency Drug Treatment Court and had often been "a star participant" in the program. The father

had completed his Parent Orientation class. He had begun the Celebrating Families class, individual therapy, and a 12-step program. Additionally, he had been submitting to random drug testing and had been visiting the child. The mother and the father were “working towards building a home together” and they wanted the child returned to their care.

On June 8, 2012, the Department prepared an addendum report. The Department recommended that the mother and the father receive family maintenance services with the child. The Department also recommended that, until the parents found housing together, the child’s primary residence should be with the mother at her THU. At the 12-month review hearing on June 11, 2012, the juvenile court adopted the Department’s recommendations.

E. The Section 388 Petition and Contested Hearing

On October 12, 2012, the child’s attorney filed a section 388 petition [change of circumstances or new evidence]. The petition alleged that the mother had relapsed on July 6, 2012, missed five drug tests between August 30, 2012 and September 25, 2012, and failed to keep in contact with the Department. The Department filed a report in response to the child’s petition and stated that it did not oppose the petition. The Department reported that the mother had not communicated with the Department, that she had not submitted to drug testing since August 23, 2012, and that she had been offered placement in a detoxification facility, but she had not reported to the facility.

On October 24, 2012, the juvenile court made an interim order placing the child in the primary custody of the father.

The contested hearing on the section 388 petition was held on November 15, 2012. The mother failed to appear and her counsel stated that she had been unable to find her. The juvenile court proceeded with the hearing, found that there was a change in circumstances, and found that it was in the child’s best interests to grant the section 388 petition. The juvenile court ordered that “the physical safety and well-being of the child

require[d] that the child's physical custody be taken from his mother." The juvenile court terminated the mother's services and ordered supervised visitation.

The child's attorney then requested that the juvenile court remove the child from the physical custody of the father, alleging that the father had relapsed. The Department stated that it was still in the process of assessing the father's current situation and that it did not have a position as to whether the child should be detained. The father denied that he was using drugs but admitted that he had two recent positive drug tests. The father requested that the child remain in his "care, custody and control" but be allowed to live with the paternal uncle. The juvenile court ordered that the child be taken into protective custody and be temporarily detained, and it directed the Department to file a section 387 petition.

F. The Section 387 Petition and Contested Hearing

On November 19, 2012, the Department filed a petition to remove the child from the father's custody pursuant to section 387 [removal required because previous disposition not effective]. The petition alleged that (1) the child had been placed in protective custody "due to a failed family maintenance placement with his father;" (2) the father had a substance abuse problem, which negatively impacted his ability to safely parent the child and placed the child at risk of harm in his care; (3) the father had attempted to tamper with his urine sample during drug testing; and (4) in violation of court orders, the father had allowed the mother access to the child, which placed "the child at risk of harm due to the mother's untreated substance abuse problem."

On January 24, 2013, the Department filed a jurisdiction/disposition report in relation to the pending section 387 petition. The Department reported that the child had again been placed with his paternal uncle and aunt. The paternal uncle wanted to become the child's legal guardian. The father had tested positive for methamphetamine on September 24, 2012 and on November 8, 2012, and he failed to submit to drug testing on four occasions between October 4, 2012 and November 9, 2012. The Department

expressed its concern about exposing the child to the relationship between the mother and the father, who were “often controlling, suspicious and verbally abusive of one another” and had a history of abusing methamphetamine together. The mother reported that the father had recently attempted to strike her with a broom. Furthermore, the father had allowed the mother access to the child in violation of court orders requiring the Department to supervise the mother’s visits.

The Department filed an addendum report explaining that although the father had once again started to put forth “greater effort into his recovery,” he had relapsed five times, and he continued to face the same issues that he faced when the child was first removed, despite having been provided with 22 months of services. Accordingly, the Department recommended that the juvenile court terminate the father’s services and set a section 366.26 permanency planning hearing for the child.

The contested hearing on the section 387 petition began on January 24, 2013. A social worker testified on behalf of the Department. She testified that the father had a long history of substance abuse, and that although he had been provided with 22 months of services, he had continued to relapse, which proved he was unable to provide a safe and stable environment for the child. All five of the father’s relapses occurred soon after the mother “had already relapsed or relapsed at approximately the same time.” The father admitted that the mother “triggers” him to abuse drugs. Additionally, the father had allowed the mother access to the child twice, despite being aware that the juvenile court had ordered that the mother’s visits be supervised by the Department. The social worker also explained that the father’s relationship with the mother was an additional risk factor because if the child was in the father’s care, “the child [would] be exposed to that relationship,” which she described as an unhealthy co-dependent relationship that provided a trigger for the father to abuse drugs.

The contested hearing was reconvened on January 30, 2013. The father did not present any evidence.

G. Findings and Orders

At the January 30, 2013 hearing, the juvenile court found “substantial evidence to maintain jurisdiction” and sustained the allegations of the section 387 petition, as amended on January 24, 2013.⁴ The juvenile court found that the father had repeatedly relapsed, which demonstrated that he was unable to provide consistent and regular care for the child. The court found the father’s failure to maintain his sobriety was significant because the child’s young age made the child vulnerable and dependent on “the protection and the guidance of an adult at all times.”

The juvenile court further found that there was “clear and convincing evidence that the welfare of the child require[d] that his physical custody be taken from the father.” The court ordered that the child be placed in foster care in the physical custody of his paternal uncle. The court ordered that services to the father be terminated and set a section 366.26 permanency planning hearing for the child on May 13, 2013.

H. Father’s Writ Petition

On March 4, 2013, the father filed a petition for writ of mandate in this court. The father asserts that the Department failed to show that the previous disposition had been ineffective or that returning the child to him would created a substantial risk of harm to the child.⁵

On March 15, 2013, the Department filed opposition to the father’s petition. The Department argues that the juvenile court’s orders are supported by substantial evidence and that the writ petition should be denied.

⁴ The amendments included changing the language in the second allegation of the section 387 petition to reflect that the father had a “substance abuse history” as opposed to a current “substance abuse problems.”

⁵ The father also states he is challenging “the initial removal ordered by the Court on November 15, 2012”; however, the father did not appeal from that order. (See § 395, subd. (a); *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150.)

II. DISCUSSION

Before evaluating the father's contentions, we will provide an overview of the statutory requirements for a section 387 supplemental petition and the termination of services and address the applicable standard of review.

A. *Section 387 Supplemental Petition and Removal*

Section 387, subdivision (a) provides: "An order changing or modifying a previous order by removing a child from the physical custody of a parent . . . and directing placement in a foster home . . . shall be made only after noticed hearing upon a supplemental petition." Section 387, subdivision (b) provides: "The supplemental petition shall be filed by the social worker in the original matter and shall contain a concise statement of facts sufficient to support the conclusion that the previous disposition has not been effective in the rehabilitation or protection of the child"

A supplemental petition may be filed by the Department where it "concludes that a previous disposition has not been effective in the protection of a child declared a dependent under section 300 and seeks a more restrictive level of physical custody." (Cal. Rules of Court, Rule 5.560(c);⁶ *Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1075 (*Kimberly R.*) [former rule 1430(c)].) "Under section 387, the Agency has the burden to show by a preponderance of the evidence that the factual allegations alleged in the petition are true." (*In re H.G.* (2006) 146 Cal.App.4th 1, 11.)

"The standard for removal on a supplemental petition is the same as removal on an original petition: the agency must show by 'clear and convincing evidence . . . [t]here is a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor' if left in parental custody 'and there are no reasonable means by which the minor's physical health can be protected without removing the minor from

⁶ All further rule references are to the California Rules of Court.

[parental] physical custody.’ [Citations.]” (*Kimberly R.*, *supra*, 96 Cal.App.4th at p. 1077.)

“If, at the section 387 adjudication [hearing], the court finds the previous disposition was not effective in the protection . . . of the child, the court is required to hold a disposition hearing. [Citation.]” (*In re Javier G.* (2006) 137 Cal.App.4th 453, 462.) “In a section 387 disposition hearing, the [Department] has the burden of proof to show reasonable efforts were made to prevent or eliminate the need for removal. [Citations.]” (*Id.* at p. 463; see § 361, subs. (c), (d).)

Where, as here, the juvenile court makes its dispositional order removing a dependent child from a parent at the same hearing as the order setting the section 366.26 hearing, the dispositional order is not directly appealable and may only be challenged by an extraordinary writ petition. (*In re Athena P.* (2002) 103 Cal.App.4th 617, 625-626; see rule 5.695(h)(15).)

B. Termination of Services

Section 361.5, subdivision (a) generally mandates that services are to be provided whenever a child is removed from the parents’ custody. “Only where there is clear and convincing evidence the [Department] has provided or offered reasonable services may the court order a section 366.26 hearing.” (*Robin V. v. Superior Court* (1995) 33 Cal.App.4th 1158, 1165 (*Robin V.*); see also *In re Luke L.* (1996) 44 Cal.App.4th 670, 678 (*Luke L.*); § 366.21, subd. (g)(4).)

“Reunification services must be ‘designed to eliminate those conditions that led to the court’s finding that the child is a person described by Section 300.’ [Citation.] Accordingly, a reunification plan must be appropriately based on the particular family’s ‘unique facts.’ [Citation.]” (*In re T.G.* (2010) 188 Cal.App.4th 687, 696 (*T.G.*); see *Luke L.*, *supra*, 44 Cal.App.4th at p. 678.) “ ‘ “[T]he record should show that the [Department] identified the problems leading to the loss of custody, offered services designed to remedy those problems, maintained reasonable contact with the parents during the course

of the service plan, and made reasonable efforts to assist the parents in areas where compliance proved difficult” [Citation.]’ [Citation.]” (*T.G.*, *supra*, at p. 697; accord, *David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 793-794.)

“The adequacy of reunification plans and the reasonableness of the [Department’s] efforts are judged according to the circumstances of each case.” (*Robin V.*, *supra*, 33 Cal.App.4th at p. 1164; accord, *Amanda H. v. Superior Court* (2008) 166 Cal.App.4th 1340, 1345.) That additional services might have been possible, or that the services provided were not the services the parent thought were best for the family, does not render the services offered or provided inadequate. “The standard is not whether the services provided were the best that might be provided in an ideal world, but whether the services were reasonable under the circumstances.” (*In re Misako R.* (1991) 2 Cal.App.4th 538, 547 (*Misako R.*)).

C. Standard of Review

“On a challenge to an order removing a dependent child from his or her parent, we are limited to whether the order is supported by substantial evidence. We view the record in the light most favorable to the order and decide if the evidence is reasonable, credible and of solid value. [Citation.]” (*Kimberly R.*, *supra*, 96 Cal.App.4th at p. 1078.) The applicable standard of review is sufficiency of the evidence. (*Kevin R. v. Superior Court* (2010) 191 Cal.App.4th 676, 688 (*Kevin R.*); *Kimberly R.*, *supra*, at p. 1078.)

Whether appellate review is sought in a writ proceeding or in an appeal, we apply the general rule that the trial court’s judgment or order is presumed correct and error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Where, as here, our standard of review requires that we review the juvenile court’s order for substantial evidence (*Kimberly R.*, *supra*, 96 Cal.App.4th at p. 1078; *Kevin R.*, *supra*, 191 Cal.App.4th at p. 688), the party challenging the order “has the burden to demonstrate that there is no evidence of a sufficiently substantial character to support the [order].” (*In*

re Geoffrey G. (1979) 98 Cal.App.3d 412, 420; see also *In re N.M.* (2011) 197 Cal.App.4th 159, 169.)

“In reviewing the reasonableness of the services provided, this court must view the evidence in a light most favorable to the [Department]. We must indulge in all legitimate and reasonable inferences to uphold the [juvenile court’s findings]. If there is substantial evidence supporting the judgment, our duty ends and the judgment must not be disturbed.” (*Misako R.*, *supra*, 2 Cal.App.4th at p. 545.) “We have no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses or to resolve conflicts in the evidence or the reasonable inferences which may be drawn from that evidence.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.)

D Analysis

The father asserts that the Department failed to show that the previous disposition had been ineffective or that returning the child to him would create a substantial risk of harm. Specifically, the father asserts that the Department failed to demonstrate a nexus between his drug use and his ability to care for and provide a safe environment for the child. To support his argument, the father cites *In re David M.* (2005) 134 Cal.App.4th 822 (*David M.*) and *In re Destiny S.* (2012) 210 Cal.App.4th 999 (*Destiny S.*). However, as we will explain, these cases are distinguishable.

In *David M.*, the court held that the evidence was insufficient to support dependency jurisdiction under section 300, subdivisions (b) [failure to protect] and (j) [abuse of a sibling]. (*David M.*, *supra*, 134 Cal.App.4th at p. 825.) As a result of his mother testing positive for marijuana when giving birth to A., two-year-old David and A. were detained. (*Id.* at p. 825.) The section 300 petition alleged that the mother and father were unable to care for the children due to their mental health problems and the mother’s substance abuse problem. (*Id.* at pp. 825-826.) However, the record before the juvenile court was lacking “any evidence of a specific, defined risk of harm to either David or A. resulting from mother’s or father’s mental illness, or mother’s substance abuse.” (*Id.* at

p. 830.) “A. tested negative for all controlled substances, including marijuana” and “was completely healthy at birth.” (*Id.* at p. 826.) Likewise, “[t]he evidence was uncontradicted that David was healthy, well cared for, and loved, and that mother and father were raising him in a clean, tidy home. Whatever mother’s and father’s mental problems might be, there was no evidence those problems impacted their ability to provide a decent home for David.” (*Id.* at p. 830.) There was no evidence that David “was exposed to drugs, drug paraphernalia, or even secondhand marijuana smoke.” (*Id.* at p. 831.)

In *Destiny S.*, child welfare services filed a petition seeking dependency jurisdiction under section 300, subdivision (b) after Destiny’s mother revealed that she had a history of abusing methamphetamine and marijuana, and the juvenile court declared Destiny a dependent of the court. (*Destiny S., supra*, 210 Cal.App.4th at p. 1001.) However, the evidence in the record demonstrated that Destiny “was a healthy, happy preteen.” (*Id.* at pp. 1001-1002.) Accordingly, the appellate court found that there was no evidence to support a finding that the mother’s drug use had caused her to neglect Destiny. (*Id.* at p. 1004.) Moreover, at 11 years old, Destiny “‘was old enough to avoid the kinds of physical dangers which make infancy an inherently hazardous period of life.’ [Citation.]” (*Ibid.*)

Here, unlike the situations presented in *David M., supra*, 134 Cal.App.4th 822, and *Destiny S., supra*, 210 Cal.App.4th 999, the record supports a finding that the father’s substance abuse and his inability to stay sober negatively impacted his ability to provide the child with a safe and stable home. In *David M.*, there was no evidence that David was ever exposed to either drugs or drug paraphernalia. (*David M., supra*, at p. 831.) In *Destiny S.*, although there was some evidence that Destiny was exposed to the smell of marijuana smoke, there was no evidence that the mother’s drug use caused her to neglect Destiny, and Destiny, at age 11, was much older than the child here. (*Destiny S., supra*, at p. 1004.) Moreover, in both *David M.* and *Destiny S.*, the evidence demonstrated that

the children were healthy and well cared for. (*David M.*, *supra*, at p. 830; *Destiny S.*, *supra*, at pp. 1001-1002.) In contrast, the record in this case shows that when the father was using drugs, he failed to seek medical treatment for the child's severe dental problems, and he exposed the child to drugs, drug paraphernalia, and guns.

We determine that substantial evidence supports the juvenile court's findings that the previous disposition had not been effective (§ 387, subd. (b)), that there would be a substantial danger to the safety and well-being of the child if he were returned to the father (§ 361, subd. (c)(1)), that reasonable efforts were made to prevent or eliminate the need for the child's removal from the father (§ 361, subd. (d)), and that the Department had provided or offered reasonable services to the father (§ 366.21, subd. (g)(4)). (See *Kimberly R.*, *supra*, 96 Cal.App.4th at p. 1078; *Kevin R.*, *supra*, 191 Cal.App.4th at p. 688.) Initially, the father maintained a home where guns, weapons, drugs, and drug paraphernalia were accessible to the child, and he failed to care for the child's medical needs, as evidenced by the extensive dental treatment that the child needed. The record indicates that the father had a serious substance abuse problem and that he had relapsed five times during the 22 months that he had been provided services. Shortly before the hearing on the section 387 petition, the father had two positive tests for methamphetamine and failed to submit to drug testing four times. Additionally, despite court orders limiting the mother's visitation to supervised visits by the Department, the father allowed the mother access to the child.

The services that were provided to the father were extensive and included case management services, parent-child visitation, counseling and parenting classes, and alcohol and drug assessment and treatment. Despite the extensive reunification and family maintenance services provided to the father over a period of nearly two years, the father failed to provide a safe and stable home for the child.

On this record, we conclude that substantial evidence supports the juvenile court's findings that the previous disposition was ineffective and that "the welfare of the child

require[d] that his physical custody be taken from the father.” We will therefore deny the father’s writ petition.

III. DISPOSITION

The petition for writ of mandate is denied.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

GROVER, J.